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IN THE

Supreme Court of the United States

October Term 1965
No. 962

JOSEPH EMORY and HARRIETT EMORY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

Supreme Court of the United States

October Term 1965
No. .....

JOSEPH EMORY and HARRIETT EMORY,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

This is a Petition for Writ of Certiorari to review a judgment of the Supreme Court of the State of California dated October 20, 1965, denying, without opinion, a hearing on the decision of the District Court of Appeal for the State of California dated April 26, 1965, affirming the Judgment of conviction of the Superior Court of the State of California rendered September 6, 1963.

A copy of the official opinion of the District Court of Appeal concerning the within matter, certified for nonpublication, is attached hereto (Appendix "A").

A denial of a petition for hearing in the Supreme Court of the State of California was had, without opinion, on October 20, 1965. (Appendix "B".)

A Order Staying Issuance of Remittitur was issued by the California District Court of Appeal on October 29, 1965. (Appendix "C".)

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(3), the Supreme Court of the State of California being a court of last resort.

STATEMENT OF THE CASE.

By information, Petitioners Joseph and Harriett Emory were charged in Count I with the crime of abortion on June 6, 1961. (California Penal Code §274.) The alleged crime was purportedly committed upon the person of one Dolores Barbara Winans. In Count II, Petitioner Joseph Emory was charged with the crime of abortion on the same person on or about June 12, 1961. The first trial of the Petitioners resulted in a mis-trial (hung jury). A second jury trial resulted in a verdict of guilty as to both defendants on all counts charged.

QUESTIONS PRESENTED.

1. Whether the decision of the California District Court of Appeal, on which decision the California Supreme Court denied a hearing, is in conflict with this Court's decisions in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) and *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), in that the California District Court of Appeal sanctioned the admissibility into evidence of a tape re[illegible] and transcription thereof which contained incriminati[illegible] statements made by Petitioners to police officers and self-serving declarations

made by the police officers, all of which statements *were tape* recorded without Petitioner's knowledge:

A. Whether the rules enunciated by this Court in *Massiah* and *Escobedo, supra,* are to be tested by the State of California "prejudicial error" rule or by the standards set forth by this Court in *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963).

B. Whether denial of counsel, as in the instant case, compels a reversal of the judgment pursuant to the rule enunciated by this Court in *Johnson v. Zerbst,* 304 U.S. 458, 82 L.Ed. 1461 (1938).

2. Whether the enforcement of California Penal Code §§1108 and 1111 in one manner against defendants charged with abortion and in another manner against all other defendants violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the admission into evidence of a tape recording of conversations had between the Petitioners and the police, which tape recording was procured by clandestine means and in which tape recording the Petitioners made incriminating statements and the police officers made statements adverse to the Petitioners and helpful to the prosecution's case, constitutes compulsory self-incrimination in violation of the Fifth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment and constitutes a violation of due process of law under the Fourteenth Amendment to the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The relevant constitution and statutory provisions are printed in Appendix "D". They are:

Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Article VI, Section 4½ of the California Constitution.

California Penal Code §§1108 and 1111.

STATEMENT OF FACTS.

The following is a concise statement of the facts material to the consideration of the questions presented herein.

On June 28, 1962, six days after their arrest, Petitioners voluntarily went to the police department for the purpose of reporting to and discussing with the police an extortion attempt which petitioners contended had been made against them by the woman on whose person they were charged with committing the abortions herein involved. Unknown to either Petitioner, the conversation with the police officers was tape recorded. Both the recording, and the transcription thereof, were admitted into evidence at the trial (a partial copy of the transcription is set forth as Appendix "E" hereto). There is nothing in the record to indicate that the Petitioners were advised of their constitutional rights at any time.

At the trial of the instant case, the only corroboration of the prosecutrix's testimony (if indeed such cor-

roboration was present at all) was provided by Norman Lee Smith, an admitted accomplice. (Both Dolores Barbara Winans, the prosecutrix, and Norma Lee Smith were given immunity at the time of the preliminary hearing pursuant to California Penal Code §1324.) Further, the only corroboration of Smith's testimony (as required by California Penal Code §1111, which is reprinted in Appendix "D" hereto) is to be found in the testimony of the prosecutrix.

REASONS FOR GRANTING THE WRIT.

1. A conflict exists between the decision of the California District Court of Appeal, on which decision a hearing was denied by the California Supreme Court, and the decisions of this Court in *Massiah v. U.S., supra,* and *Escobedo v. Illinois, supra,* in that the District Court of Appeal has misinterpreted the decisions of this Court as applied to statements made by Petitioners six days after their arrest, which statements were tape recorded without their knowledge.

A. A conflict exists between the decision of the California District Court of Appeal, on which decision the California Supreme Court denied a hearing, and the decisions of this Court in that the District Court of Appeal has applied a "prejudicial error" test although V, VI and XIV Amendment constitutional rights have been infringed.

B. To determine whether the denial of counsel, in the instant case, compels a reversal of the judgment pur-

suant to the rule enunciated by this Court in *Johnson v. Zerbst, supra.*

2. A new question of law is presented, namely, whether the enforcement of California Penal Code §§1108 and 1111 in one manner against defendants charged with abortion and in another manner against all other defendants violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. A new question of law is presented, namely, whether the admission into evidence of a tape recording of conversations had between the Petitioners and the police, which tape recording was procured by clandestine means and in which tape recording the Petitioners made incriminating statements and the police officers made statements adverse to the Petitioners and helpful to the prosecution's case, constitutes compulsory self-incrimination in violation of the Fifth Amendment to the United States Constitution as made applicable to the States by the Fourteenth Amendment and constitutes a violation of due process of law under the Fourteenth Amendment to the United States Constitution.

ARGUMENT.

1. **Whether the Decision of the California District Court of Appeal, on Which Decision the California Supreme Court Denied a Hearing, Is in Conflict With This Court's Decisions in Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) and Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).**

A cursory reading of the transcript of the tape recording, which contains a portion of the statements made by the defendants to the police officers (Appx. E), indicates that the police were not in fact interested in obtaining evidence of an extortion attempt against defendants, but were interested in obtaining damaging admissions by insinuating, sly and cleverly worded questions posed by experts in interrogation. Not only does the recording, and the transcription thereof, contain damaging statements made by the defendants, it also contains inflamatory statements made by the police officers. Typical of such statements is that made by Captain Brown (Appx. E, p. 36), wherein he states, "That you can save yourself—could have saved yourself this trouble and can save a lot of trouble in the future of this type, if you will stop doing abortions you don't have to worry about—." The facts of the instant case relating to the tape recordings are strickingly similar to those involved in *Massiah v. U.S., supra,* In *Massiah,* the petitioner was indicted for violating the Federal Narcotics Laws. He retained a lawyer, pled not guilty and was released on bail. While he was free on

bail, a Federal Agent succeeded by surreptitious means in recording *incriminating statements* made by him. Evidence of these statements was introduced against the petitioner at his trial. In fact, *Massiah* and the instant case are almost identical, with the exception that the petitioners herein were charged pursuant to information and not indictment.

In *Massiah,* this Court held that the defendant's own incriminating statements obtained by Federal Agents under clandestine circumstances could not constitutionally be used by the prosecution as evidence against him, since his counsel was not present at the time the incriminating statements were elicited. It is submitted that the same holding is required in the instant case.

In addition to the direct and cogent applicability of this Court's decision in *Massiah,* Petitioners respectfully submit that *Escobedo v. Illinois, supra,* is equally in point. Thus, the incriminating statements herein involved were elicited at a time when the investigation had ceased to be a general investigation and had focused on particular suspects (the Petitioners were already arrested), the police were carrying out a process of interrogation that lent itself to eliciting incriminating statements and Petitioners were not warned by the police of their absolute right to remain silent or of the fact that the police were trying to obtain and manufacture evidence rather than investigate an extortion complaint of the petitioners.

A. Whether the Rules Enunciated by This Court in Massiah and Escobedo, Supra, Are to Be Tested by the State of California "Prejudicial Error" Rule or by the Standards Set Forth by This Court in Fahy v. Connecticut, supra.

The California District Court of Appeal summarily dismissed Petitioners' contentions below that the rule of *People v. Dorado,* 62 Adv. Cal. 350, 42 Cal. Rptr. 169 (1965) required a reversal of the instant case.[1] Although no clear reasons were given for the District Court's decision, apparently the decision was based on one of the following three grounds:

1. That the *Dorado* rule was inapplicable in that incriminating statements and not "confessions" were involved in the instant case.

2. That counsel's stipulation to the introduction of the tape recording precluded the assertion of inadmissibility on appeal.

3. That the admission of the tape recording was not prejudicial.

The first two grounds can be disposed of rather easily. First, Petitioners respectfully submit that the *Dorado* case does not stand for the proposition that in-

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[1]In *Dorado* it was held that the "defendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but began to focus on a particular subject, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he waived these rights." (42 Cal. Rptr. 169, 179)

criminating statements, which fall short of a full confession, are admissible in spite of the fact that the defendant was not advised of his constitutional rights. It is further submitted, however, that irrespective of the interpretation given the *Dorado* case, such an interpretation runs afoul of this Court's decision in *Massiah v. U.S., supra,* in which case statements not amounting to confessions were held violative of the defendant's constitutional rights. See also *Escobedo v. Illinois, supra.*

Second, Petitioners submit that the fact that their counsel stipulated to the admission of the tape recording and failed to object thereto does not preclude them from raising the issue of the inadmissibility of the recording and transcription on appeal. At the time of the trial of this case, neither the California Supreme Court's decision in *People v. Dorado, supra,* nor this Court's decision in *Massiah v. United States, supra,* and *Escobedo v. Illinois, supra,* had been rendered. Counsel for petitioners had, therefore, no reason to object to the introduction of the tape recording and transcription. It was only after the decisions in the above referred to cases were rendered that counsel for Petitioners was apprised of the fact that the tape recording and transcription were probably inadmissible. Since this case is still pending on direct appeal and no collateral attack is involved, Petitioners respectfully submit that the contentions herein advanced were and are timely raised. See *Linkletter v. Walker,* 85 S. Ct. 1731 (1965).[2]

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[2]Petitioners' standing to raise this point on appeal has been recognized by the California courts in similar cases. Petitioners position is closely analogous to the defendant in *People v. Kitchens,* 46 Cal. 2d 260, 294 P. 2d 17 (1956) wherein it was held that the

As indicated above, it is also possible that the District Court of Appeal did not consider the *Dorado* rule applicable because it did not believe the admission of the tape recording was prejudicial to the defendants. Even assuming a prejudicial test can be attributed to *Dorado,* it is submitted such a test is contrary to this Court's decisions, as the following discussion demonstrates.

After exhaustive research, no case decided by this Court can be found which has upheld a judgment in which a substantial constitutional right of the defendant has been infringed. It is for this reason that Petitioners respectfully submit that the California Courts preoccupation with the prejudicial error rule (pursuant to Article VI, Section 4½ of the California Constitution, Appendix "D") are in conflict with the decisions of this Court.

In *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) involving a VI Amendment deprivation of counsel, the Court stated at page 702:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as Counsel for Kretske is at once difficult and unnecessary. *The right to counsel is too fundamental and absolute to allow*

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defendant was not barred from raising for the first time on appeal the fact that evidence was illegally obtained when his trial occurred before *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955), in which case the Court held illegally seized evidence inadmissible. Petitioners' position is also closely analogous to the position of the defendant in *People v. Hillery,* 44 Cal. Rptr. 30 (1965), where the Court held statements made in violation of the rule enunciated in *People v. Dorado, supra,* were inadmissible although the defendant did not object to their admissibility at the trial where the trial occurred prior to the *Dorado* decision.

courts to indulge in nice calculations as to the amount of prejudice from its denial." (Emphasis added.)

Similar language can be found in many decisions of this Court. See, *e.g., Malinski v. New York,* 324 U.S. 401, 89 L. Ed. 1029 (1945); *Kotteakos v. United States,* 328 U.S. 750, 66 S. Ct. 1239, 9 L. Ed. 1557 (1946).

It is respectfully submitted that the above cited cases clearly repudiate the tests used by the Courts in California, *i.e.,* whether sufficient evidence remains for conviction after extricating from the records the constitutionally violative evidence. Similarily, in one of the most recent indications of this Court's philosophy relative to the "prejudicial error" rule, the following quotations can be found:

> "On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of harmless error under the Federal standard of what constitutes harmless error. Compare *Ker v. California,* 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623. We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. . . ." (11 L. Ed. 2d 171, 173.)

It is respectfully submitted that the decisions of the California Courts in interpreting §4½ of Article 6 of the California Constitution so as to require "prejudicial error" to be present before a reversal of a judgment can be had, conflicts with this Court's decisions, some of which are discussed above.

B. Whether Denial of Counsel, as in the Instant Case, Compels a Reversal of the Judgment Pursuant to the Rule Enunciated by This Court in Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461 (1938).

It is respectfully submitted that the fact that petitioners were not represented by counsel at the time they made the incriminating statements referred to above and partially printed in Appendix "E" hereto, dictates a reversal of the judgment herein. In *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461 (1938), this Court stated that the effect on the infringement of defendant's right to counsel guaranteed by the Sixth Amendment was as follows:

> "If the accused, however, is not represented by Counsel . . . The Sixth Amendment stands as a jurisdictional bar to a conviction and sentence depriving him of his life or his liberty. *A Court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the Court—as the Sixth Amendment requires* . . . If this requirement of the Sixth Amendment is not complied with, the Court no longer has jurisdiction to proceed. *The judgment of conviction pronounced by a Court without jurisdiction is void.* . . . (Emphasis added.) (304 U.S. 458, 468.)

2. Whether the Enforcement of California Penal Code §§1108 and 1111 in One Manner Against Defendants Charged With Abortion and in Another Manner Against All Other Defendants Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

California Penal Code §§1108 and 1111 are printed in Appendix "D" hereto. As indicated in the discussion above, the only corroboration of the prosecutrix' testimony in this case was given by Smith, an admitted accomplice. Similarly, the only corroboration of Smith's testimony is to be found in the testimony of the prosecutrix. The California cases interpreting Penal Code §§1108 and 1111 hold that the prosecutrix and an accomplice can corroborate each other's testimony because the prosecutrix is not herself an accomplice. This rule was apparently originated in *People v. Clapp*, 24 Cal. 2d 835, 151 P. 2d 237 (1944) and has been followed in subsequent cases. See, *e.g., People v. Wilson*, 25 Cal. 2d 341, 153 P. 2d 720 (1944).

The effect of the decision in the *Clapp* case and those decisions which have followed it (*e.g., People v. Wilson, supra*) is to negate the corroboration requirement of Penal Code §1108 and to apply that section unequally to a defendant charged with abortion, as compared with a defendant charged with any other kind of crime. Said in another way, in all other crimes in California requiring corroboration, an accomplice cannot corroborate another accomplice; yet by holding that the prosecutrix in an abortion case is not an accom-

plice, the prosecutrix is permitted to be corroborated by an accomplice, whose testimony would not be sufficient to convict absent the corroboration given to it by the prosecutrix.

It is respectfully submitted that the interpretation and application of Penal Code §§1108 and 1111 denied Petitioners herein, who are charged with the crime of abortion, equal protection under the law in that the corroboration required in every other kind of offense is not required in the case of a defendant charged with abortion.

Petitioners are aware of the rule so frequently stated by this Court that the equal protection clause of the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . ." *Beck v. Washington,* 369 U.S. 541, 82 S. Ct. 955, 9 L. Ed. 2d 98 (1962). Petitioner respectfully submits, however, that this is not the issue presented in the instant case.

Petitioners assume that the statement that the equal protection clause does not "assure uniformity of judicial decisions" means that given the same or similar facts in two different cases, the same result need not be reached by the same Court. Surely, however, the law must be applied equally in each case. It is the unequal application and construction of the law (Penal Code §§ 1108 and 1111) by the California Courts in abortion cases which constitutes the vice in the instant case. That the California Courts constitute an agency of

the State so as to bring their action within the ambit of the constitutional protection afforded by the Fourteenth Amendment, cannot be doubted. See *e.g. Shelley v. Kramer,* 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1947).

The statements by this Court in *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) are as applicable to the instant case as they were to the facts presented to the Court over a quarter of a century ago. In the *Yick Wo* case, the Court stated:

> ". . . For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration and thus representing the State itself, with a mind so unequal and oppressive as to amount to a tactical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authorities with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . ." (118 U.S. 356, 373-374.)

3. Whether the Admission Into Evidence of a Tape Recording of Conversations Had Between the Petitioners and the Police, Which Tape Recording Was Procured by Clandestine Means and in Which Tape Recording the Petitioners Made Incriminating Statements and the Police Officers Made Statements Adverse to the Petitioners and Helpful to the Prosecution's Case, Constitutes Compulsory Self-Incrimination in Violation of the Fifth Amendment to the United States Constitution as Made Applicable to the States by the Fourteenth Amendment and Constitutes a Violation of Due Process of Law Under the Fourteenth Amendment to the United States Constitution.

Previous decisions of this Court have held that the use of an involuntary confession offends the Fifth Amendment's prohibition against self-incrimination. See, *e.g., United States v. Carignan,* 342 U.S. 36, 72 S. Ct. 97, 96 L. Ed. 48 (1951).

In *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), this Court held that the prohibitions of the Fifth Amendment of the United States Constitution against self-incrimination applies to the States through the Fourteenth Amendment.

It is respectfully submitted that the admission into evidence of a tape recording which contains incriminating statements made by the defendants and/or the perpetuation of statements which are self-serving to the prosecution is as offensive to the Fifth Amendment as is an involuntary concession. How can it be said to a defendant that he cannot be compelled to be a witness against himself, yet condone the clandestine procuring and admission into evidence of the very state-

ments which the defendant has been told he need not utter. Furthermore, it would seem that the statements obtained from a defendant without his knowledge need not constitute a full confession since this Court in *Massiah v. U.S., supra,* did not impose the requirement that the statements of a defendant be the equivalent of a full confession before such statement can be precluded from admission into evidence where a substantial constitutional right has been violated.

Finally, Petitioners respectfully submit that, independent of any other constitutional grounds, the secretive recording of a defendant's statement and the use of such statement in evidence, offends a basic sense of justice so as to make such statement inadmissible in courts of law. *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

Conclusion.

For the foregoing reasons, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted and that the issues herein raised be given plenary consideration by the Court.

Respectfully submitted,

BURTON MARKS,
Attorney for Petitioners.

APPENDIX A

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People, Plaintiff and Respondent, vs. Joseph Emory and Harriet Emory, Defendants and Appellants. 2nd Crim. No. 9774.

Filed August 26, 1965.

Appeal from judgments and order of the Superior Court of Los Angeles County and from orders denying motions for new trial. Maxwell M. Willens, Judge. Judgments and order affirmed. Appeal from orders denying motions for new trial dismissed.

For Appellants: Burton Marks.

For Respondent: Thomas C. Lynch, Attorney General; William E. James, Assistant Attorney General; Norman H. Sokolow, Deputy Attorney General.

Joseph Emory, after trial by jury, was found guilty of two counts of abortion, his wife, Harriet, was at the same trial found guilty of one count of abortion. Joseph was sentenced to state prison for the term prescribed by law. Harriet was granted probation for five years. Both defendants appeal.

Mrs. Winans, the abortee, testified that in 1959 she made arrangements through an unnamed druggist for an abortion and was called for by a man named Munson who drove her to Dr. Emory's office on Osborne Street in the Valley. Upon entering Munson's car she gave him $300 in cash for which she received no receipt. She was in good health at this time. Mrs. Winans waited in the reception room until Munson waved her into

an examining room at the rear of the office where she met Mrs. Emory who gave her a kimona, had her get on the table with her legs in stirrups, placed a sheet over her legs and left the room. Neither Munson nor Mrs. Emory ascertained Mrs. Winans' history, age or physical condition. Munson gave her some shots which made her sleepy. Dr. Emory entered within fifteen minutes and may have asked her questions regarding her pregnancy. Munson held a mask over her face administering ether while Dr. Emory performed the abortion.

During the abortion Mrs. Winans would wake up occasionally and Munson would put the mask back on. At this time Mrs. Winans felt the insertion of an object into her private parts and felt pain in that vicinity. Dr. Emory told her to hold still, the procedure lasted about twenty minutes and on its completion she noted blood in the pan at the foot of the table. Dr. Emory told her not to be afraid; that she would have some pain for a period of time; he gave her some pain pills and penicillin pills. Munson took Mrs. Winans out the back door, drove her home and, on the following evening, came to her home and gave her a shot. At some time after the performance of the abortion she passed the fetus.

In 1961 Mrs. Winans again believed she was pregnant. She was in good health when she sought to terminate this pregnancy by making an appointment by telephone to see Dr. Emory and subsequently visiting his office on or about June 6th at 13171 Osborne, Pacoima. She was driven to the office, a good hour's drive, by Norman Smith either in one of her business trucks or in her car. She assumed she told Smith the purpose of her visit and that either at her home or in the car she handed Smith $100 leaving her with $100.

Mrs. Winans and Smith entered the Emory office together, she was in the waiting room a half hour until she was taken to an examining room where she stayed another fifteen or twenty minues before being taken to a second examining room where Mrs. Emory demanded full payment. Mrs. Emory called Smith into the room, Mrs. Winans handed him $100 and he paid that to Mrs. Emory together with the $100 theretofore given to him by Mrs. Winans.

When Smith had left the room Mrs. Emory gave Mrs. Winans a shot which required ten or fifteen minutes to take effect; her legs were placed in stirrups and Dr. Emory entered.

Mrs. Winans talked of the 1959 incident involving Munson and told him that she was pregnant. Both Dr. and Mrs. Emory attempted to verify her pregnancy and wanted to know how she was sure. She had been furnished a gown by Mrs. Emory who also wheeled in a cart with instruments. Dr. Emory made a pelvic examination and indicated that he was sure she was pregnant. Mrs. Winans was given a mask to hold over her face, Mrs. Emory stood beside her to assist in holding the mask. An instrument was inserted into Mrs. Winans' private parts which caused so much pain that she would scream. Dr. Emory told her to be quiet as he did not want other patients to hear her. Following this procedure Mrs. Emory gave Mrs. Winans a shot of penicillin and some pills and told her to do a great deal of straining to terminate the pregnancy. Mrs. Winans was in the second examining room a half hour to forty-five minutes. Upon leaving she went directly home accompanied by Smith. She remembered on one visit to Dr. Emory's office that Smith mentioned misplacing

some keys on the trip home. She did not miscarry as a result of this incident.

About June 12, 1961, Mrs. Winans returned to Dr. Emory's office, she was then in good health. Smith again took her and she stayed in the waiting room for fifteen minutes to a half hour before going into one of the examining rooms. She there explained to Mrs. Emory that she had not miscarried and after perhaps an hour and a half she was again prepared and another incident identical with that on June 6th followed with more sensation and considerable pain. She again left with Smith. She did not miscarry as a result of this incident.

After waiting well over a week Mrs. Winans again returned to Dr. Emory's office, this time she was alone. Dr. Emory told her if it didn't work this time he would rather give her her money back, he did not want to try again. The same procedure followed as at the earlier 1961 incidents, but, being by herself, she was driven to Dr. Emory's home where she remained about a half hour. Mrs. Emory gave her some pills and some instructions and she went home. Later that evening she miscarried and her tenacious pregnancy terminated.

Some seven or eight months after the last described visit Mrs. Winans again visited Dr. Emory in company with Florence Kahn and tried to get her money back because she felt he was unfair. Dr. Emory refused to return the money, but did make an offer to deliver her baby, she being once again pregnant.

Norman Smith, the man who accompanied Mrs. Winans on the two visits to Dr. Emory's office upon which the instant criminal proceeding was founded, testified that before June 6, 1961, Mrs. Winans told him

she was going to have an abortion and asked him to drive her to the office, which he did on that date. The drive in one of the trucks owned by the building maintenance company operated by Smith and Mrs. Winans as partners took from one to two hours. Upon arrival at the office Smith saw both Dr. and Mrs. Emory there. After waiting in the reception room for some thirty to forty minutes and going to a drugstore next door Smith returned and asked Mrs. Emory if he could see Mrs. Winans. He saw Mrs. Winans alone in a little room, she gave him two one hundred dollar bills and told him to give the money to appellants. Mrs. Emory entered and told him he would have to leave. Before leaving he gave the two one hundred dollar bills to Mrs. Emory who did not give him a receipt therefor.

Smith went back to the drugstore where he read a magazine and then returned to the office where he asked Mrs. Emory what was taking so long and whether anything was wrong. She told him nothing was wrong.

Some time later Smith was told by either Dr. or Mrs. Emory to bring the automobile alongside of the building to the back door. This he did and in a little while Mrs. Winans came out and they drove home, at that time she was in a little pain, looked a little white, a little weak. Upon arriving at Mrs. Winans' home Smith discovered that certain keys were missing. He returned late that afternoon or early that evening to Dr. Emory's office where Mrs. Emory gave him his keys.

Before or on June 12, 1961, Mrs. Winans told Smith "it didn't work" and that she was going back to see the doctor. The afternoon of that date Smith again drove Mrs. Winans to the same office in the same vehicle. Again Smith took Mrs. Winans to the reception room

and waited there for ten or fifteen minutes after Mrs. Winans had gone back in the office to see the doctor. Smith then took a walk to the neighboring drugstore and to a hardware store. Shortly after he returned to the office Dr. Emory told him to bring the car to the back door and pick up Mrs. Winans. When Mrs. Winans came out she appeared to be in more pain than on the first visit, she complained a little as he drove her home.

There was also testimony of Officer Fred Mitchell of the Los Angeles Police Department, who was the investigating officer in the instant case, as to certain conversations with Mrs. Winans relative to her visits to Dr. Emory and the payment of $200 for an abortion and the fact that she had early in 1962 gone to the Emory home to ask for money.

At the time of their arrest on June 20, 1962, Officer Mitchell asked appellants if there had been any attempt to extort money from them and told them they were entitled to the protection of the law like anyone else and asked them to report any attempt.

Thereafter on June 28, 1962, Dr. and Mrs. Emory came to the Police Administration Building and had a conversation with Officer Mitchell and Captain Brown. This conversation was tape-recorded without appellants having knowledge thereof. This tape recording was played to the jury and a transcript of the taped conversation was received in evidence by stipulation of both counsel for appellants and the deputy district attorney.

This conversation was one wherein appellants related a visit of two women, one pregnant, to their home at which time one woman charged Dr. Emory with having tried unsuccessfully to abort the pregnant one and stated

that he should give the woman some money or make some kind of amends or they would report him to the police. The account of the incident was confused as to whether or not the women gave any names, whether they were to telephone or visit Dr. Emory at a later time or what exactly was said or done at the time. Later in the conversation with the police officers Dr. Emory stated that he had said to the pregnant woman: " 'Well, why don't you come to me for delivery?' " and also " 'I could say that if you had been to me and I was responsible for your condition,' I says, 'If I'm responsible for your condition,' I says, 'I would glady make some kind of a deal.' " At this conversation with the police Dr. Emory and Mrs. Emory identified the pregnant woman as Mrs. Winans through the use of private detectives.

The foregoing facts are stated with the rule in mind that facts on such an appeal as this must be viewed in the light most favorable to the People. (*People v. Sweeney*, 55 Cal. 2d 27, 33.) There was conflicting testimony introduced by the testimony of both appellants to the effect that neither ever participated in any of the acts alleged by Mrs. Winans although stating that she had been the subject of a pelvic examination during the fitting of a contraceptive device in the office on March 16th and March 18th, 1961. That the extortion attempt was reported to Dr. Emory's attorney, a fact corroborated by that attorney's testimony, and a number of witnesses testified as to being present in the office on or about the dates charged in the information and that they saw neither Mrs. Winans or Norman Smith there.

Appellants contend that as a matter of law the evidence was insufficient to sustain the finding of guilty as to either defendant, lacking sufficient corroboration

under Penal Code § 1108, failing to show that the abortion, if committed was not necessary to preserve the life of the abortee and failing to establish any specific intent to procure miscarriage; that only a single offense of abortion was shown; that the prosecution committed reversible error in introducing evidence of the 1959 abortion in bad faith and only to prejudice the minds of the jury, in knowingly using perjured testimony and in misstating during argument that defense counsel had "stipulated" that the defendants had lied; that the tape and transcription of statements made after arrest and not in the presence of counsel were inadmissible and constituted prejudicial error and that miscellaneous procedural errors were cumulative so as to deny defendants a fair trial.

In urging the insufficiency of the evidence appellants meticulously and emphatically examine the inconsistencies in the testimony of Mrs. Winans and Norman Smith. Such an approach in argument in the trial court might well have resulted in a different verdict. Upon appeal, however, familiar rules are applied and if upon any hypothesis there is sufficient substantial evidence to support the findings of the trier of fact such findings will be upheld; the question here is not whether or not guilt is established beyond a reasonable doubt. (*People v. Daugherty,* 40 Cal. 2d 876, 885.) That was a question decided by the jury. The credibility of witnesses and the weight and value of their testimony are matters to be determined by the trier of fact. (*People v. Ashley,* 42 Cal. 2d 246, 266.) The trier of fact may accept some portions of a witness' testimony and reject other portions and that portion supporting the judgment will be accepted on appeal. (*People v. Dragoo,* 121 Cal. App. 2d 322, 324.) This rule applies even to testimony which

is or is claimed to be perjured. (*People v. Bodkin,* 196 Cal. App. 2d 412, 414-15.)

Applying these rules to the testimony of Mrs. Winans it appears that the jury could properly find that appellants performed abortions upon her.

Her testimony must, however, be corroborated in order to support the conviction (Penal Code § 1108); in such manner as to tend to connect the defendant with the commission of the offense so as to reasonably satisfy the trier of fact that the witness to be corroborated is telling the truth. The corroborating evidence may be circumstantial and need not extend to all of the elements of the offense nor to every detail in the testimony of the witness to be corroborated and it suffices if it tends even in some slight degree to implicate the defendants; the weight to be accorded it is a question of fact. (*People v. MacEwing,* 155 Cal. App. 2d 117, 123; *People v. Malone,* 82 Cal. App. 2d 54, 61.)

Mrs. Winans' testimony shows the elements of abortion with specificity. Her testimony as to her good health is admissible and need not be corroborated to establish the fact that the abortion was not necessary to preserve her life. (*People v. Kutz,* 187 Cal. App. 2d 431, 436.) Smith's testimony corroborates that of Mrs. Winans, if believed, by showing her intent as expressed by her to obtain an abortion, the fact of two visits to appellants' office and of seeing appellants there; the fact of payment of $200 for which no receipt was given and the fact that at the end of each visit she appeared to be weak and in pain. This is sufficient corroboration under the applicable rules. (*People v. Gallardo,* 41 Cal. 2d 57, 63; *People v. MacEwing,* 45 Cal. 2d 218; *People v. Toney,* 192 Cal. App. 2d 711, 716.)

A woman who submits to an abortion is not an accomplice of the abortionist (*People v. Emery,* 79 Cal. App. 2d 226, 229), and her testimony may therefore be corroborated even by that of one who is an accomplice.

The arguments of appellants relying upon *People v. Tatge,* 219 Cal. App. 2d 430, *People v. Ballard,* 218 Cal. App. 2d 295, and *People v. Ballard,* 167 Cal. App. 2d 803, are not persuasive when the different facts presented in those cases are viewed in light of the facts here.

Appellants' contention that if any offense was committed it was only a single offense is grounded upon *People v. Simon,* 21 Cal. App. 88, a case that supports their position. It appears, however, that recent cases have held that more than one abortion may be performed in an attempt to terminate a single pregnancy, as the gist of the offense is not the actual consummation of an abortion as such but rather the performance of any of the acts enumerated in Penal Code section 274 with the intent to procure a miscarriage. (See *People v. Collins,* 186 Cal. App. 2d 329, 340-41, and cases there cited.) Judged by this standard Dr. Emory could properly be convicted of two abortions and Mrs. Emory could properly be convicted of one abortion.

In urging that there was misconduct of the prosecution appellants state that by introducing evidence of the 1959 abortion the prosecution misused evidence to prejudice the minds of the jurors against the appellants. In so contending it is argued that because there were other parties involved in the 1959 incident there was no sufficient "similarity of means" shown to justify the admission of the evidence to show general plan, scheme and

device. The fact that others were involved in the 1959 abortion does not weaken the similarity of the acts then alleged to have been performed by appellants to the acts alleged to have been performed by them in 1961. That such evidence is admissible is well established. (*People v. Morani,* 196 Cal. 154; *People v. Kerns,* 134 Cal. App. 2d 110.)

Further misconduct is alleged to have occurred by the prosecution presenting what it knew to be perjured testimony. Such a charge is more easily made than supported by the record here. There were variations between testimony at the preliminary hearing and the trial, but such variations were apparent to the jury and were no doubt weighed and considered. The claim that evidence was suppressed is without support in the record.

During his closing argument the deputy district attorney, apparently in an effort to turn an oratorical phrase, said in part: ". . . counsel for the defense in his summation stipulated that his client, Joseph Emory and Harriett [sic] Emory, could not be believed, are not to be believed." Objection was immediately made and the court immediately instructed the jury that there was no such stipulation. Under these circumstances it is presumed that the jurors followed the admonition of the court. (*People v. Andrus,* 159 Cal. App. 2d 673, 679.) The mere statement that prejudice resulted from a single sentence in an argument of considerable length does not make the statement true.

Appellants state that the admission of taped recordings and transcriptions thereof of conversations between appellants and Smith and appellants and police officers requires reversal. The recording of the telephone conversation with Smith and its transcription was intro-

duced by appellants and contains nothing remotely damaging to appellants excepting some lurid language used by Dr. Emory in describing Mrs. Winans. The recording and its transcription of the conversation between appellants and the police officers was also admitted by stipulation and appellants now urge that such stipulation and failure to object to the introduction of this matter brings into play the rule stated in *People v. Ibarra,* 60 Cal. 2d 460, and *People v. Kitchens,* 46 Cal. 2d 260, that counsel was incompetent in stipulating to the admission of these statements, or was negligent, or that he was unaware of the rule of law which subsequently developed.

The rules of law referred to are those enunciated in *Massiah v. United States,* 337 U.S. 201, 12 L. Ed. 2d 246; *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, and *People v. Dorado,* 62 Cal. 2d .....*.

The mere mention of Dorado does not, we think, compel instant reversal. Here the appellants voluntarily sought out the police over a week after their arrest and gave statements which were designed to incriminate Mrs. Winans of an attempt at extortion. The fact that the police already knew of this activity is of no consequence. The statement in and of itself was of little value to the prosecution and the substance of it was as detrimental to the character of Mrs. Winans as to the position of the defendants. Although it is contended that the police were not interested in obtaining evidence of extortion, but were interested in obtaining damaging admissions by insinuating and sly questions, the tenor of the conversation does not support such contention and no such admissions were obtained nor apparently sought.

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*Advance Report Citation: 62 A.C. 350.

Appellants finally state that miscellaneous errors and the denial of the motion for a new trial considered cumulatively in connection with what is stated to have been an extremely close case require a reversal.

While it is true that at times throughout the trial the judge reconsidered rulings he had previously made regarding the admissibility of evidence, he properly instructed the jury as to any such matters; usually after extended discussion with counsel outside the hearing of the jury and in most instances with the express approval or at the request of defense counsel. A careful and extended examination of the entire record does not require reversal whn the rule of *People v. Watson,* 46 Cal. 2d 818, 836, is obeyed, namely: "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

The judgments, including the order granting probation to appellant Harriet Emory, are affirmed. The orders denying motions for new trial not being appealable, the purported appeal therefrom is dismissed.

McMurray, *J. pro tempore.**

We concur.

Ford, *Acting P. J.*

Kaus, *J.*

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*Assigned by Chairman of Judicial Council.

APPENDIX B.

Order Denying Hearing After Judgment by District Court of Appeal, 2nd District, Division 3, Crim. No. 9774.

Order Due October 25, 1965

In the Supreme Court of the State of California, in Bank.

People v. Emory et al.

Filed Oct. 20, 1965.

Appellants' petition for hearing Denied.

Traynor
Chief Justice

APPENDIX C.

Order Staying Issuance of Remittitur.

In the District Court of Appeal, Second Appellate District, State of California.

People of the State of California, Plaintiff and Respondent, vs. Joseph Emory and Harriett Emory, Defendants and Appellants. No. 9774.

Filed Oct. 29, 1965.

Upon application of Defendants and Appellants, by and through their attorney of record, and good cause appearing therefor:

It is Hereby Ordered that the Remittitur in this action be stayed pending the application by Defendants and Appellants for a Writ of Certiorari to the Supreme Court of the United States, or until further order of this court.

Shinn
Justice of the District Court of Appeal

APPENDIX D.

FIFTH AMENDMENT — UNITED STATES CONSTITUTION

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

SIXTH AMENDMENT — UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT—UNITED STATES CONSTITUTION

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE VI, SECTION 4½—CALIFORNIA CONSTITUTION

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CALIFORNIA PENAL CODE SEC. 1108

Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away an unmarried fe-

male of previous chaste character, under the age of eighteen years, for the purpose of prostitution, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence.

CALIFORNIA PENAL CODE SEC. 1111

A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the case in which the testimony of the accomplice is given.

APPENDIX E.

. . .

A. Yeah, yeah. I—I said, "She does look familiar," I says, "Yes, she looks familiar," like, you know, you'd seen—

Q. Like you had seen her before? A. Yeah. Well, anyway, I said, "what do you want?" I was asking, you know, what—I assumed they were going to talk about, you know, delivery situation. And she said, "Well, we have to talk to you in private."

A. . . . she said do I—do I know—or said, "Are you familiar with this girl?" or she—"It looked familiar to you," or something like that, she put it that way. And I said, "Well, she looks familiar, yes." Then—then they mentioned about, well, they'd like to talk in private. Then we went into the maternity building.

. . . .[7]

. . . it was obvious enough she was pregnant, she says. She said that she had come to me for an abortion —or that's what—I don't know how she put it, but anyway I indicated as much, I feel that's what she said. I don't know exactly whether it was that word, but that she indicated probably I did something—supposed to have done something for her. It didn't work and what am I going to do about it? What am I going to do about it? And she said—wanted to know—that's how she put it, something about too—she kind of—she kind of inquiring how I do abortions, how—how—how would a—oh, she said—she also said that I had abortions myself, she says. And I—"I've had abortions," she says, "and the guy's done this way and that way," she says, "how do you do abortions," or—or, "How do abortions

done?" or something like that. You know, she tried to keep, you know, asking around that way. And I said —I said, "Girls will do many ways." I said, "Abortion could be done by shoving pencil, you could do this, you could do that," I said, "how do I know?" says, "abortions in many ways." I mean, anything—anything, "Giving shots, drugs, this, that, what it is. Anything that you cause—make a woman to lose a baby is an abortion," you know.

. . . .

Q. —but did they indicate when you had supposed to [9] have aborted this girl? A. No, No.

Q. They just said you— A. That I was supposed to have, and then she went on—then she's going on this spiel that this woman is—that she's not married; that she has children who are old enough to realize that she's not a married woman, it's embarrassing for her, and that—that she thinks I should make some kind of amends, or I should—think that—

Q. Well, did she want you to perform an abortion on her at that time? A. No, she indicated somehow that she thinks I ought to pay off, you know, something that she—I get—you know, she wants some money from me, or I should pay her some money because—

Q. What—why—why did she think you should pay her money? A. Well, I don't know, but the idea is that that's what she implied, that I feel that I—I'm responsible for her case. Well, I told her, I says, "You mean you think I am responsible for her condition?" . . . [10]

. . . .

Q. Now, I would like some more specific information regarding the visit of these two women on January the 17th, 1962. I mean, if—I know you folks have given

us a lot of thought, now can you recall exactly what was said about money? How much money did they want? What—

Dr. Emory: They didn't specify any amount.

Mrs. Emory: They didn't ask for—

Q. What were they going—

Dr. Emory: They wasn't a specific amount, they just fishing—fishing around and they felt that I should make some kind of amends—

. . . .

. . . .

. . .—and I mentioned, "Well, why don't you come to me for delivery?" And she said, "Well, I have the—I got my doctor already picked out." I said—in fact, she said, "I'm overdue." She—think she said, "I'm overdue." And I says, "Well," [21] I says—I says, "If—" I says, "I could say that if you had been to me and I was responsible for your condition." I says, "If I'm responsible for your condition," I says, "I would glady make some kind of a deal." I'd make a—deliver her baby or have her baby delivered at a reasonable fee, "if I felt that I am responsible for you being that way." And that's what I told the girl. . . . [22]

. . . .

Q. Well, now the one that you didn't know, that was unfamiliar, did all the talking? A. Most of it, yes.

. . . .

Q. Most of the talking. And she stated that the other girl had been to you sometime—

Dr. Emory: Yeah, she said—

Q. —before for an abortion? A. Yes.

Q. And that the attempt abortion was unsuccessful and that the girl— A. She implied—she implied that, yes.

Q. Yeah. A. Implied it.

Q. And that the pregnant condition that was obvious— A. Was—was my—is my fault—

Q. —was because the abortion was unsuccessful? A. Yes.

Q. And that this girl was confronted with hospital bills and delivery fees— A. Hospital bills, yes, . . . [23]

Q. And she felt that she should have—

Mrs. Emory: And she was going to be out of work.

Q. —the money back that she had paid for the abortion?

Mrs. Emory: Not money back.

Dr. Emory: No, no, no, no.

Mrs. Emory: No, not that. She—she just said that—and she wasn't able to work, naturally, in this condition and she wanted money from him, but she didn't specify any sum, and she said, "You won't help me. You don't give me any money."

Dr. Emory: She—she say, "You won't—" I said—

Mrs. Emory: This is the woman herself said.

Dr. Emory: —"You don't feel that you owe me anything?

Mrs. Emory: You won't give me any money. You won't help me."

Q. The pregnant woman said that?

Mrs. Emory: The pregnant woman said that.

Dr. Emory: That's what she—she made some—wanted to—she felt—said to me, "You won't give me anything." . . . . [24]

. . . .

Q. And I told you at that time that both you and Mrs. Emory are just as entitled to the protection of the law as anyone else and that we were perfectly willing

to investigate any attempt made to extort money from you, and I put you on warning that if anyone approached you and represented that they could influence this prosecution, that they were attempting to extort money from you, and that we solicited your telling us about this and that we would prosecute these people. I also told you that in the previous prosecution, that the case had originated in the Santa Monica Police Department, it came to the Los Angeles Police Department through official channels. . . . [27]

. . . .

Q. Because, Doctor, as I have told you, this information came to us embraced in a lot of other information, and the part regarding you was turned over to me for investigation. The original information was obtained by another police department. Lieutenant—I mean, Captain Brown assigned me to investigate the part of the alleged abortion performed by you. I interviewed these people. And they told me that there had been an abortion, and the one witness provided the corroboration that the law requires. . . . .

Dr. Emory: I can imagine. I can imagine.

Q. —but to arrest you. But— A. I could imagine this corroborating witness is to—

Mrs. Emory: But this—this—this is the person, I mean, I don't know how you can do—and this is the woman and we are positive, I mean—

Dr. Emory: This is the woman, we seen the son-of-a-bitch.

. . . . [29]

. . . .

Mrs. Emory: Wait a minute. Why don't you leave and let me talk for just one moment.

Q. No, sit still, Doctor. I don't want to be alone with your wife, I mean, I don't want to give you the opening —

Dr. Emory: Same old crap, I mean—

Mrs. Emory: I mean, this isn't so, I mean—

Dr. Emory: Same old crap.

Mrs. Emory: —and I don't know how we're going to get it across to someone, but this is what happened.

Captain Brown: Could I—could I ask a couple of questions here? If there was an attempt—an attempt back in—on January the 17th, 1962, to abort—to—

Dr. Emory: Extort.

Captain Brown: —extort money from you people, why wasn't it reported at that time to the police department so action could be—

Mrs. Emory: We should have.

. . . . [31]

. . . .

Q. She told me she came to your home to try to get the two hundred dollars back that she had paid you for the abortion.

Dr. Emory: Yeah, well she can bring that up then in court. She can bring that up in—

Q. But it has no bearing on this case.

Dr. Emory: Hah.

Q. It doesn't. Legally it has no bearing on this case.

Mrs. Emory: But it was an extortion attempt and we—

Q. All we have to prove is that something was done to this woman with the intent—

Mrs. Emory: —didn't see her until—oh, no, no.

Q. —to cause a miscarriage.

Dr. Emory: Well, she can try to prove that too—

Q. Well, we're going to—

Dr. Emory: —because we got—

Q. We're going to offer our evidence that this woman came to your office and that you attempted to induce a miscarriage; that she came there three times— [34]

Dr. Emory: That's good enough.

Q. And she paid the money to Mrs. Emory. This is what we'll offer in court.

Dr. Emory: Uh huh.

Q. And she told me—

Dr. Emory: And she had a corroborating witness and stuff?

Q. I have a witness, yes, sir.

Dr. Emory: Great, great. I can see—see the whole setup.

Q. What is the setup, sir?

Dr. Emory: Well, I'm (Unintelligible) in court, but the point is, you people—now, I'll say it this way, you people are refusing to—to even help me out here, is that true?

Q. I'm not refusing.

Dr. Emory: Not investigate—not to investigate this thing, is that true?

Q. I'm already investigating it. I had this story when I talked to the woman.

Dr. Emory: Hah. Well, anyway, let's go, because like I say, this is the thing because that's—only thing, we got—we got to go other places I see, we're not getting no help from this place. You got no help in this place.

Q. Well, Doctor, if there's any possible prosecution—

Dr. Emory: There's no sense of you giving me any [35] stuff, because you're just—just talking like a —let's go.

Mrs. Emory: Okay, I'll be with you.

Dr. Emory: Because we're going to have somebody —somebody's going to—

Captain Brown: I—I might make a suggestion to you, Doctor—

Dr. Emory: Yeah.

Captain Brown: —that you can save yourself—could've saved yourself this trouble and can save a lot of trouble in the future of this type, if you'll stop doing abortions you don't have to worry about—

Dr. Emory: Yeah.

Captain Brown: —all this type stuff.

Dr. Emory: I didn't do the thing. I didn't do the thing.

Mrs. Emory: Well, he wouldn't be angry because — [36]